

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CRAIG R. TINDELL)	
Claimant)	
)	
VS.)	Docket No. 1,059,684
)	
ASSOCIATED WHOLESALE GROCERS)	
INC.)	
Self-Insured Respondent)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the April 4, 2012, preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh. Keith L. Mark, of Mission, Kansas, appeared for claimant. Karl L. Wenger, of Kansas City, Kansas, appeared for the self-insured respondent.

The Administrative Law Judge (ALJ) found that claimant failed to prove by a preponderance of the evidence that his left shoulder condition arose out of and in the course of his employment with respondent, either by traumatic injury or by repetitive trauma. Accordingly, claimant's request for workers compensation benefits was denied.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the April 4, 2012, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Claimant asks the Board to reverse the Order of the ALJ and find that claimant's left shoulder injury was compensable under the Kansas Workers Compensation Act.

Respondent asserts that claimant failed to prove he suffered a personal injury either as a result of a single traumatic accident on February 1, 2012, or from repetitive trauma. Respondent asks that the ALJ's Order be affirmed, arguing that claimant failed to meet any of the prongs of the traumatic injury test found in K.S.A. 2011 Supp. 44-508(f).

The issue for the Board's review is: Did claimant sustain personal injury either by an accident or repetitive trauma that arose out of and in the course of his employment with respondent?

FINDINGS OF FACT

On February 17, 2012, claimant filed his Application for Hearing in which he claimed a series of accidents caused by "repetitive heavy work moving product culminating while loading a trailer on 2/1/12 and tried to pry a box loose using his left arm & injured his left shoulder."¹

Claimant was 58 years old at the time of the preliminary hearing, and he began working for respondent on April 22, 1981. As of February 1, 2012, claimant was working as a driver loader. His job entailed lifting items that weighed anywhere from 1 to 2 pounds up to 85 to 90 pounds. Claimant shrink-wrapped product to keep it from falling off the pallet, which required him to work and lift above shoulder height while pulling the wrap tightly. Claimant also described his job as fast-paced, stating that respondent had production standards that needed to be met. Claimant stated that in his 31 years of working for respondent, he did not have a chargeable on-the-job injury until his current injury. However, he experienced aches and pains while performing his repetitive, fast-paced, strenuous job duties.

On February 1, 2012, claimant was loading a pallet onto a trailer when one of the cases on top of the pallet got wedged in between the top of the trailer door and the door seal. Claimant got off his forklift and reached up with his left hand to try to pry the cases out. In doing so, he felt a sharp pain in his left shoulder and heard a pop. The wedged case came loose, and claimant returned to his forklift and finished loading the trailer. He was able to continue operating the forklift, which he normally steers with his left hand. Claimant testified that although his shoulder was tender, he was able to finish out his shift.

When claimant went home he took a shower and went to bed. He did not treat his shoulder in any way. Three or four hours after he fell asleep, he was awakened by the pain he felt in his left shoulder. He took some Ibuprofen and went back to bed, but when he got up his left shoulder was still bothering him, so he reported the injury to respondent. Respondent sent claimant to Concentra the day he reported the injury, February 2, 2012, and claimant described his accident to the medical providers. He was sent to have an MRI on February 6, 2012, which showed a full thickness large rotator cuff tear. Claimant was told by a doctor at Concentra that he was diagnosed with complete rupture of his rotator cuff, subscapularis tear, glenohumeral arthrosis, fraying infraspinatus, subchondral cyst,

¹ Form K-WC E-1, Application for Hearing filed February 17, 2012. The form used by claimant does not contain the new language for repetitive traumas. Instead, it asks claimant to "[s]tate specifically the exact cause and source of accident/disease."

and shoulder pain. He was told by the doctor that although he had significant left shoulder problems, they were not related to his employment. Concentra then referred claimant to an orthopedic surgeon, Dr. Erich Lingenfelter.

Claimant saw Dr. Lingenfelter on March 16, 2012. He gave Dr. Lingenfelter a history of his injury. Dr. Lingenfelter's medical history indicates that claimant "continued to work all day and then apparently there was some concern that he helped move his mother and there is an ongoing investigation as to whether there was something done outside of work that has caused this."² Claimant testified that helping his mother move was nothing more than taking her around to help her decide where she wanted to move. His mother did not move until February 24, 2012, and claimant did not help with the actual moving.

Dr. Lingenfelter reviewed the MRI and agreed it showed a full thickness large rotator cuff tear. However, he also stated the MRI showed that claimant had grade II fatty degeneration present in the tear, significant glenohumeral arthritis with marked thinning of the articular cartilage, as well as labral degeneration consistent with chronicity. Dr. Lingenfelter opined:

When someone has grade II fatty degeneration, it clearly confirms for a fact, without any question, that there is a chronicity to the tear. You do not get grade II fatty degeneration and infiltration and a two tendon tear four days after an injury. Therefore, without a doubt something has been going on before. When I question him about this, he said that his shoulder had hurt in the past and he wen [sic] on to say that he has done a lot of repetitive lifting out of the plane of the body loading and repetitive motion with his shoulder and he also attributes this to his shoulder pain in the past. If we are asked that did this specific incident cause this finding, for a fact this is indisputable that it did not.³

Claimant was seen by Dr. William Hopkins on February 14, 2012, at the request of claimant's attorney. Dr. Hopkins reviewed the MRI report of February 6, 2012, which he noted showed a full thickness rotator cuff tear of the supraspinatus tendon. Dr. Hopkins said claimant also had some tendinopathy involving the infraspinatus and some partial thickness tears of the infraspinatus with an associated tear of the subscapularis tendon. In addition, claimant had a dislocation of the biceps glenohumeral joint as well as diffuse labral degeneration, including a superior anterior labral tear. Claimant had type I acromion with moderate osteoarthritis of the acromioclavicular joint. Dr. Hopkins said claimant had some superior migration of the humeral head, as was to be expected with a full thickness supraspinatus tear with retraction.

² PH Trans., Resp. Ex. A at 1.

³ *Id.* at 2.

Dr. Hopkins opined that claimant's long-term work duties in his 31-year history with respondent, culminating with the specific injury of February 1, 2012, are the prevailing factors causing claimant's temporary inability to work at gainful employment. Dr. Hopkins stated that although at claimant's age he would have some degree of degenerative changes, "[t]o disregard his injury as a culminating event causing the tear of his supraspinatus tendon with its massive retraction in association with dislocation of the biceps tendon, in my opinion, is a misrepresentation of the facts."⁴ Dr. Hopkins believed claimant should be evaluated by a shoulder surgeon and surgery performed as soon as possible.

Claimant denied having any problems with his left shoulder prior to the February 1, 2012, incident, other than the normal pain he had working, which he felt in his shoulders, knees and legs. He had seen no doctor concerning his left shoulder before the accident.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501b states in part:

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508 states in part:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

(e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

⁴ PH Trans., Cl. Ex. 1 at 4.

...
(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3) (A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

...
(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁵ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.⁶

ANALYSIS

Initially, there is the question of whether claimant's injury was caused by a single accident or by repetitive trauma. Dr. Lingenfelter was asked specifically whether the incident on February 1, 2012, caused claimant's findings on MRI. Dr. Lingenfelter opined that claimant's two torn tendons and other findings did not occur in a single event on February 1, 2012. Instead, it was his opinion that the tears were something that had been going on for some time. But claimant is not alleging that his left shoulder problems are all a result of the single trauma at work on February 1, 2012. Rather, claimant has alleged a series of repetitive work-related traumas each and every day worked and continuing through February 1, 2012. This is consistent with Dr. Lingenfelter's opinion "that repetitive loading and lifting out of the plane of the body can cause attritional overload which can lead to this"⁷

Additional support for the work activities over time causing claimant's current condition comes from Dr. Hopkins. "His [claimant's] 31 years of heavy repetitive work duties culminating with the specific injury on 2/1/2012 are the prevailing factor causing his current medical condition and his current need for treatment with regard to his left shoulder."⁸ Respondent points to the portion of Dr. Hopkins' report which reads: "At his [claimant's] age of 58 certainly some degree of degenerative changes is going to occur under the normal course of events. At least half of the male population beyond the age of 50 has similar changes."⁹ However, Dr. Hopkins was not referring to all of the findings disclosed by the MRI. In addition to the torn tendons, claimant had other degenerative type conditions. Dr. Hopkins noted:

An MRI report of Mr. Tindell's left shoulder was reviewed. This study was ordered by Dr. Wakwaya. The report was from an MRI which was performed on

⁵ K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, rev. denied 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

⁶ K.S.A. 2011 Supp. 44-555c(k).

⁷ PH Trans., Resp. Ex. A at 2.

⁸ PH Trans., Cl. Ex. 1 at 4.

⁹ *Id.*

February 6, 2012. A multiplicity of serious abnormalities were noted. He had a complete full thickness rotator cuff tear of the supraspinatus tendon involving the tendon primarily at the level of the insertion with a 24 mm tendon retraction. He did have some tendinopathy involving the infraspinatus and had some partial thickness tears of the infraspinatus with an associated tear of the subscapularis tendon. In addition, he had a dislocation of the biceps tendon anteriorly with underlying tendinopathy. He had moderate arthrosis of the glenohumeral joint was described as well as diffuse labral degeneration including a superior anterior labral tear. He had a type I acromion with moderate osteoarthritis of the acromioclavicular joint.¹⁰

Dr. Lingenfelter likewise noted the multiplicity of serious abnormalities revealed by the MRI.

IMAGING: MRI, which I have reviewed and is of a reasonable quality, shows a full thickness large rotator cuff tear with about 2.5 cm of retraction. He has grade II fatty degeneration already present in this. This MRI was dated four to five days after his reported work injury. He has significant glenohumeral arthritis with marked thinning of the articular cartilage, as well as labral degeneration consistent with chronicity and essentially osteoarthritis and chondromalacia of the glenohumeral joint. He has multiple subchondral cystic changes in the lateral humeral head and acromioclavicular joint arthrosis as well. He also has a tear of the subscapularis tendon that also has fatty degeneration as well with a dislocated biceps tendon which we as shoulder surgeons term a pulley lesion. There is also cephalad migration of the humerus on the MRI which is not an uncommon finding with rotator cuffs in general. On the plain x-rays the acromiohumeral distance is maintained. He has some degenerative changes present in the glenohumeral joint as well as the acromioclavicular joint.¹¹

What it appears Dr. Hopkins was alluding to when he said “[a]t least half of the male population beyond the age of 50 has similar changes”¹² are the degenerative changes that were in addition to the torn tendons, not the tendon tears themselves. Certainly over 50 percent of males over 50 do not have full thickness tears of their subscapularis and supraspinatus tendons with massive retraction.

This Board Member finds that claimant has met his burden of proving he met with injury to his left shoulder by repetitive work-related traumas and that those traumas are the prevailing factor in causing his injury and need for treatment. Claimant’s work activities exposed him to a greater risk of injury than he was exposed to in his normal non-employment life.

¹⁰ PH Trans., Cl. Ex. 1 at 3.

¹¹ PH Trans., Resp. Ex. A at 1.

¹² PH Trans., Cl. Ex. 1 at 4.

CONCLUSION

Claimant sustained personal injury by repetitive trauma arising out of and in the course of his employment with respondent.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated April 4, 2012, is reversed and remanded to the ALJ for further orders consistent herewith.

IT IS SO ORDERED.

Dated this _____ day of May, 2012.

HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

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Kenneth J. Hursh, Administrative Law Judge